LE COPY

Office-Supreme Court, U.S.
FILED
APR 20 1960
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1959.

No. 872

PAUL JOHN CARBO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

A. L. WIRIN,
FRED OKRAND,
257 South Spring Street,
Los Angeles 12, California,
Attorneys for Petitioner.

WILLIAM B. BEIRNE,
408 South Spring Street,
Los Angeles 13, California,
Of Counsel.

The Myers Legal Press, Los Angeles. Phone MA. 5-8820.

TOPICAL INDEX

PAGE

Opinions below 1

Grounds on which the jurisdiction of this court is invoked 2

Questions presented for review 2

Statutes involved 2

Statement of the case 4

Basis for federal jurisdiction in the court of first instance 4

Facts 4

Reasons for granting the writ and argument amplifying same 6

Preliminary statement 6

I.

The decision of the court below is in conflict with decisions of other courts of appeals 6

Seventh Circuit 6

Third Circuit 9

First Circuit 10

II.

The decision of the court below has decided an important question of federal law, namely, that the District Courts have extraterritorial jurisdiction to issue writs of habeas corpus ad prosequendum. This question has not been, but should be, settled by this court 11

III.

The decision below has decided a federal question, namely, that District Courts have extraterritorial jurisdiction to issue writs of habeas corpus ad prosequendum, in a way which conflicts with this court's decisions in Ahrens v. Clark, 335 U. S. 188 and United States v. Hayman, 342 U. S. 205 13

Conclusion 20

PAGE

Appendices:

Appendix "A." Opinion of the United States Court of Appeals for the Ninth Circuit.....App. p. 1

Appendix "B." Appeal from the United States District Court for the Southern District of California, Central Division. Judgment .....App. p. 8

Appendix "C." Order .....App. p. 9

Appendix "D." Amended writ of habeas corpus ad prosequendum, being an amendment to the writ of habeas corpus ad prosequendum issued.....App. p. 11

TABLE OF AUTHORITIES CITED

CASES

	PAGE
Ahrens v. Clark, 335 U. S. 188	6, 11, 13, 14, 18, 20
Brotherhood of Firemen & Engineers v. Toledo, etc. Grain Co., 332 U. S. 748	12
De Simone v. United States, No. 202, October Term 1959	11
Edgerly v. Kennelly, 215 F. 2d 420	6, 7, 9
Frisbie v. Collins, 342 U. S. 519	8
Goldberg v. Hoffman, 225 F. 2d 463	7
Joint Anti-Fascist Refugee Committee v. McGrath, 341 U. S. 123	20
Mitchell v. Dexter, 244 Fed. 926	17
Nelson v. County of Los Angeles, No. 152, Oct. Term 1949, ... U. S. ....., 4 L. Ed. 2d 494	9
Palmer v. Thompson, 20 App. D. C. 273	16
Phillips v. Hiatt, 83 Fed. Supp. 935	9, 10
Ponzi v. Fessenden, 258 U. S. 254	15
Securities & Exchange Commission v. Long Island Plating Co., 325 U. S. 833	12
Shimola v. Local Board No. 42, 40 Fed. Supp. 808	7
Taylor v. McGrath, 194 F. 2d 882	11
United States v. Coles, 88 Fed. Supp. 150	9
United States v. Hayman, 342 U. S. 205	6, 11, 15, 18, 20
United States v. Kniess, 251 F. 2d 669	8
Van Collins, In re, 160 Fed. Supp. 165	9, 10, 14
Yodock v. United States, 196 F. 2d 1018	8

RULES

Federal Rules of Criminal Procedure, Rule 4(c)(2)	16
Federal Rules of Criminal Procedure, Rule 19(1)(b)	11, 13, 20
Federal Rules of Criminal Procedure, Rule 22(3)	2
Federal Rules of Criminal Procedure, Rule 37(b)	2

STATUTES

	PAGE
Act of September 24, 1789, Chap. 20, Sec. 14 (1 Stat. 81)	16, 17
62 Statutes at Large, p. 964	2
63 Statutes at Large, p. 102	4
63 Statutes at Large, p. 105	2
64 Statutes at Large, p. 944	4
United States Code, Title 8, Sec. 43	7
United States Code, Title 8, Sec. 47	7
United States Code, Title 8, Sec. 48	7
United States Code, Title 18, Sec. 371	19
United States Code, Title 18, Sec. 875(b)	19
United States Code, Title 18, Sec. 1951	19
United States Code, Title 28, Sec. 451	14
United States Code, Title 28, Sec. 452	14
United States Code, Title 28, Sec. 453	14, 15
United States Code, Title 28, Sec. 1254(1)	2
United States Code, Title 28, Sec. 1651	2, 4, 6, 7, 15
United States Code, Title 28, Sec. 1651(a)	16, 17, 20
United States Code, Title 28, Sec. 2101(c)	2
United States Code, Title 28, Sec. 2241	2, 4, 6, 13, 14, 15, 20
United States Code, Title 28, Sec. 2241(a)	14
United States Code, Title 28, Sec. 2241(c)	15
United States Code, Title 28, Sec. 2241(c)(3)	14
United States Code, Title 28, Sec. 2241(c)(5)	14
United States Code, Title 28, Sec. 2255	19
United States Code, Title 42, Sec. 1983	7
United States Code, Title 42, Sec. 1985	7
United States Code, Title 42, Sec. 1986	7
United States Constitution, Sixth Amendment	9

IN THE

Supreme Court of the United States

October Term, 1959.
No. .....

PAUL JOHN CARBO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner, Paul John Carbo, respectfully prays for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit in order to review its judgment affirming an order and judgment of the United States District Court for the Southern District of California denying a motion to quash a writ of *habeas corpus ad prosequendum.*

Opinions Below.

The District Court delivered no written opinion upon making its order denying petitioner's motion to quash the writ.

The opinion of the court below [R. III, 4][1] is not yet reported. It is appended hereto as Appendix "A."

The judgment of the court below [R. III, 10] is appended hereto as Appendix "B."

[1]The record certified to this Court is in four volumes, denominated: I, II, III and Supplemental. Each volume is paginated separately. Accordingly, R. III, 4 refers to page 4 of Volume III, etc. "Supp" will refer to the supplemental transcript of record.

Grounds on Which the Jurisdiction of This Court Is Invoked.

1. The date of the judgment sought to be reviewed and the time of its entry is March 23, 1960 [R. I, 29].

2. No petition for rehearing was filed.

3. The statutory provisions believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari are 28 U. S. C. 1254(1) and 2101(c), Rule 22(2) and (3) of this Court and Rule 37(b), Federal Rules of Criminal Procedure.

Questions Presented for Review.

Does a United States District Court have jurisdiction under 28 U. S. C., 2241 or 28 U. S. C., 1651 to issue a writ of *habeas corpus ad prosequendum* requiring the production of a prisoner, then confined beyond the court's territorial jurisdiction, for trial before the issuing District Court?

Statutes Involved.

28 U. S. C., 2241 (62 Stat. 964, amended 63 Stat. 105) provides:

"(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

"(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

"(c) The writ of habeas corpus shall not extend to a prisoner unless:

"(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or,

"(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

"(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or,

"(4) He, being a citizen of a foreign state and domiciled therein, is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations or

"(5) It is necessary to bring him into court to testify or for trial."

28 U. S. C., 1651 (62 Stat. 944, amended 63 Stat. 102); provides:

"(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

"(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction."

Statement of the Case.

Basis for Federal Jurisdiction in the Court of First Instance.

It is claimed by respondent that the trial court had jurisdiction under 28 U. S. C., 2241 and 1651.

Facts.

Petitioner is a defendant in a criminal proceeding pending in the United States District Court for the Southern District of California [R. I, 2]. He had been arraigned on December 2, 1959 [R. I, 18] and had pleaded not guilty on December 8, 1959 [R. I, 19].

On March 16, 1960, application was made to the District Court by the United States Attorney for a writ of *habeas corpus ad prosequendum* for the production of the body of petitioner in Los Angeles on March 29, 1960 for trial [R. I, 28]. That same day the court ordered the issuance of the writ [R. I, 28], and the writ was issued [R. II, 5].

On the same day petitioner filed a motion to quash the writ on the ground that the court had no jurisdiction to issue it [R. I, 20].[2] The motion was denied [R. I, 29] and notice of appeal to the court below was immediately filed [R. I, 30].

Respondent noticed a motion to dismiss the appeal with the court below for March 22, 1960 [R. Supp., 1].

On March 23, 1960 the court below affirmed, on the merits [R. II, 3], the order of the District Court denying the motion to quash the writ (App. A).

During all this time, and since, petitioner was and is ill and detained in the prison ward of the New York City Bellevue Hospital [R. I, 21, 22]. Because of that illness petitioner underwent a serious kidney operation on March 25, 1960. On March 28, 1960, the District Court continued the trial of the cause to July 12, 1960 and ordered the issuance of an amended writ, staying the enforcement thereof to June 24, 1960.[3] One of the reasons for the court's so doing was to afford this Court an opportunity to determine the issue herein and to avoid the mooting of this petition.

---

[2]Petitioner's motion to quash was actually filed two days before, on March 14, 1960 [R. I, 20]. The explanation for this is that a previous application and order for a writ had been made on March 11, 1960 by the United States Attorney but was defective in form. By stipulation in open court on March 16 (the return date of petitioner's motion to quash the previous writ) it was agreed that the moving papers and the Government's return [R. I, 24] would be deemed to be addressed to the March 16 papers.

[3]A copy of the Order is attached hereto as Appendix "C," and of the Amended Writ issued pursuant thereto, as Appendix "D."

REASONS FOR GRANTING THE WRIT AND ARGUMENT AMPLIFYING SAME.

Preliminary Statement.

It seems perfectly plain from this Court's decision in *Ahrens v. Clark*, 335 U. S. 188, as well as from its decision in *United States v. Hayman*, 342 U. S. 205, that the power given the District Courts by 28 U. S. C., 2241, is limited territorially whether the particular writ involved is *habeas corpus ad subjiciendum*, as in *Ahrens*, or *testificandum* or *prosequendum*, has here. Accordingly, for the court to have power to issue an extraterritorial writ, that power must somehow be spelled out of 28 U. S. C., 1651, an exercise in orthography we say cannot be done. This, because of the general rule that absent "specific exceptions created by Congress the jurisdiction of the district courts is territorial" (*Ahrens v. Clark*, 335 U. S. at 190, and because the cases, as well as the language of the section, seem clear to the effect that 1651[4] does not, nor did Congress intend to, enlarge the jurisdiction of the courts. It is the court below's misapprehension of this fact that necessitates this petition and the granting thereof herein.

I.

The Decision of the Court Below Is in Conflict With Decisions of Other Courts of Appeal.

Seventh Circuit.

In *Edgerly v. Kennelly*, 215 F. 2d 420 (1954), cert. den. 348 U. S. 938, the court held that the District Courts did not have jurisdiction to issue an extraterritorial writ of *habeas corpus ad testificandum*. In answer to the argu-

[4]Its predecessor, as well as that of 2241, have been on the statute books from the beginning (1 Stat. 81; Sec. 14 of Act of Sept. 24, 1789).

ment that because the court had jurisdiction over plaintiff's action under the Civil Rights Act (former 8 U. S. C., 43, 47, 48, now 42 U. S. C., 1983, 1985, 1986), it has jurisdiction to bring him before the court under 28 U. S. C., 1651, the court said (pp. 421-422):

> ". . . Plaintiff . . . concedes . . . that the jurisdiction of the court, if it exists, must be found in the 'all writs statute,' 28 U.S.C.A. §1651, which authorizes a court to 'issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.' It is pointed out that the court had jurisdiction of the action and it was in aid of its jurisdiction that the plaintiff be brought to Chicago to testify in his own behalf. This contention, if accepted, would mean that this provision enlarged the territorial jurisdiction of the court. We think that such is not its purpose. While the section augments the power of a court in cases of existing jurisdiction, it in no wise expands or extends its territorial jurisdiction."[5]

While *Goldberg v. Hoffman*, 225 F. 2d 463 (1955), did not involve an *ad testificandum* or *ad prosequendum* matter, it is clear that the Seventh Circuit adheres to its *Edgerly* decision and considers it to be sound law. Thus it said (pp. 467):

> "The historic limitation of the jurisdiction of the various federal courts to the Circuit or District in

---

[5]*Cf. Shimola v. Local Board No. 42*, 40 Fed. Supp. 808, 809 (N. D. Ohio 1941):

> "That section (28 USC 377, the predecessor to the now 28 USC 1651) however, merely makes available to the District Court 'all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions', but it does not confer or expand jurisdiction."

> which they sit is too well established to require restatement. Georgia v. Pennsylvania R. Co., 324 U. S. 439, 467, 65 S. Ct. 716, 89 L. Ed. 1051; Edgerly v. Kennelly, 7 Cir., 215 F. 2d 420; Reconstruction Finance Corp. v. Maley, 7 Cir., 125 F. 2d 131, 137. We have recently rejected as untenable the theory that the All Writs Act, 28 U.S.C.A. §1651, may enlarge the territorial jurisdiction of the federal courts. Edgerly v. Kennelly, supra, 215 F. 2d at page 421-422. See also Ahrens v. Clark, 335 U. S. 188, 68 S. Ct. 1443, 92 L. Ed. 1898."

See also *United States v. Kniess*, 251 F. 2d 669 (1958).

Third Circuit.

In *Yodock v. United States*, 196 F. 2d 1018 (1952), the defendant had been brought to trial from another jurisdiction by means of a writ of *habeas corpus ad prosequendum*. *After* sentence he moved to vacate on the ground that the trial court had not acquired jurisdiction over him. The court affirmed the trial court's order denying the motion to vacate on the ground that (p. 1018): "The manner in which his presence was secured did not affect the power of the court to try him."[6] But as to the validity of the extraterritorial writ of *habeas corpus ad prosequendum*, the court said (*ibid*):

> "It may be conceded that the writ was improperly issued to a custodian outside the Middle District of Pennsylvania."

A noteworthy District Court decision of the Third Circuit, and one which has not been overruled or criticized,

---

[6] *Cf.* this Court in *Frisbie v. Collins*, 342 U. S. 519.

but on the contrary has been cited with approval and followed[7] is *Phillips v. Hiatt*, 83 Fed. Supp. 935 (D. Del. 1949).[8] In that case a defendant in a criminal action pending before the Delaware Federal Court was incarcerated in the Federal Penitentiary at Atlanta, Georgia. Claiming the right to a speedy trial under the 6th Amendment, the defendant moved the court for a writ (though not so denominated) of *habeas corpus ad prosequendum*. The court thus posed the question (pp. 936-937):

> "The question in this case is whether a United States District Court has the power or jurisdiction to issue a writ of habeas corpus or other writ in the nature thereof on behalf of a person confined in a federal penitentiary outside the territorial limits of such court under a sentence imposed by another United States District Court, when the purpose of the writ is to have the prisoner brought within the territorial jurisdiction of the issuing court to stand trial on a new and different charge."

In answering the question in the negative, the court exhaustively discussed the matter. For example (p. 938):

> ". . . (A)ssuming that petitioner's counsel are correct in that the relief sought by petitioner may properly be granted under Section 1651, still such relief may not be granted by this court for the very

---

[7] *Edgerly v. Kennelly*, 215 F. 2d 420, 422 (C. A. 7, 1954), cert. den. 348 U. S. 938; *In re Van Collins*, 160 Fed. Supp. 165, 167 (D. Me. 1958); and see *United States v. Coles*, 88 Fed. Supp. 150, 151, n. (D. Ore. 1949).

[8] In the oral argument before this Court in *Nelson v. County of Los Angeles*, No. 152, Oct. Term 1959, ... U. S. ....., 4 L. Ed. 2d 494, one of the Justices chided counsel for petitioners for not citing or relying upon pertinent District Court cases. Counsel do not intend to make the same mistake here.

same reason that relief may not be granted under Section 2241, viz., that the order of this court may not run beyond its territorial jurisdiction.

"Under general provisions of law, a United States District Court cannot issue process beyond its territorial limits. Georgia v. Pennsylvania R. Co., 1945, 324 U. S. 439, 467-468; 65 S. Ct. 716, 89 L. Ed. 1051. A specific exception by Congress is a prerequisite to the extension of the district court's jurisdiction beyond their respective territorial limits. . . ."

And it concluded its opinion (p. 940):

"Irrespective of the desire of this court to secure to petitioner what may be deemed to be substantial constitutional rights, the lack of jurisdiction in the court compels a dismissal of the petition."

First Circuit.

Here again we rely upon an untampered with District Court decision,[9] *In the Matter of Karol Van Collins,* 160 Fed. Supp. 165 (D. Me. 1958). The situation there was essentially the same as in *Phillips v. Hiatt, supra,* the defendant seeking to be brought before the court for trial by means of a writ of *habeas corpus ad prosequendum.* In denying the writ, the court said (pp. 166-167):

". . . There is nothing in §1651 specifically giving to district courts the power to issue writs thereunder beyond their respective territorial limits. It follows, therefore, that this Court is without jurisdiction under §1651 to grant the relief sought for the same reason that it may not grant relief under §2241, viz., that the order of this Court may not run beyond its territorial jurisdiction. . . ."

[9]See footnote 8, *supra.*

Accordingly it follows that this is a proper case for the granting of certiorari under this Court's Rule 19(1)(b) (1st phrase).[10]

II.

The Decision of the Court Below Has Decided an Important Question of Federal Law, Namely That the District Courts Have Extraterritorial Jurisdiction to Issue Writs of Habeas Corpus ad Prosequendum. This Question Has Not Been, but Should Be, Settled by This Court.

It is manifest that whether the District Courts have jurisdiction to issue extraterritorial writs of *habeas corpus ad prosequendum* is an important question of federal law. That this Court considers important the question of the territorial power of the District Courts to issue writs is seen from its grant of certiorari in *Ahrens v. Clark*, 335 U. S. 188 and *United States v. Hayman*, 342 U. S. 205.

Moreover, just this term, this Court again demonstrated its interest by its handling of *De Simone v. United States*, No. 202, October Term, 1959, an *ad testificandum* matter on all fours with the case at bar including incarceration in New York and invoking a writ from the same District Court and a petition for writ of certiorari to the same Circuit Court of Appeals.

In that case, after the court below had dismissed the appeal from the order denying the motion to quash the

---

[10]In the light of the District of Columbia Circuit's ruling in *Taylor v. McGrath*, 194 F. 2d 882 (1952), the view of that circuit is not clear. The Court in *Phillips v. Hiatt*, *supra*, was of the opinion that even before the *Taylor* case, the District of Columbia court had overruled earlier decisions which seemed to have sustained extraterritorial jurisdiction (83 Fed. Supp. at 939-940).

writ as frivolous, De Simone filed a petition for writ of certiorari with this Court. In response thereto the Government suggested mootness, but was not content to rely thereon and argued the merits to the effect that the District Court had extraterritorial jurisdiction (pp. 2 and 3, Memorandum for the United States Suggesting Mootness).

In response thereto, this Court issued an interesting order (361 U. S. 873) not accepting the Government's statement at its face value and, *sua sponte* challenging that posture of the case. In that order it asked for the Government's view as to whether any of the orders of the courts below was still outstanding in that they could "possibly" be made the basis for further contempt proceedings against petitioner. The Government's response was that the writ of *habeas corpus ad testificandum* was not outstanding, and that technically two orders of the District Court were still outstanding but that the Government expected to take no action under them.

Thereupon this Court granted certiorari (361 U. S. 125). This in and of itself is noteworthy in view of the Government's argument on the merits. If the Court had felt there were not a substantial and important question, we suggest it might well have merely denied certiorari and that would have been the end of the matter. But, as seen, it did not deny certiorari; it granted it.

Following the grant of certiorari, the Court also did another unusual thing. It not only vacated the judgment of the Court of Appeals and remanded to the District Court, with instructions to dismiss as moot, as is usually done (*cf. Brotherhood of Firemen & Engineers v. Toledo, etc., Grain Co.*, 332 U. S. 748; *Securities & Exchange Commission v. Long Island Plating Co.*, 325 U. S.

833), but it went further and vacated *all* orders *including* the order of the District Court denying the motion to quash the writ of *habeas corpus ad testificandum*, thus leaving for another day, this case we suggest, for a determination of the question.

Finally, it should be brought to the attention of this Court, that in the instant case, even though the trial court denied the motion to quash the writ, it expressed the view that the question is one which might well be decided by this Court. Thus the trial court said [R. III, 2]:

> "The motion is denied. In peremptorily denying it, I do not mean that it isn't worthy of discussion. I think this is a question which should go to the Court of Appeals. It is perhaps a question upon which the Supreme Court should be given an opportunity to adjudicate."

Accordingly, we submit, this is a proper case for the granting of certiorari under this Court's Rule 19(1)(b) (3rd phrase).

III.

The Decision Below Has Decided a Federal Question, Namely, That District Courts Have Extraterritorial Jurisdiction to Issue Writs of Habeas Corpus ad Prosequendum, in a Way Which Conflicts With This Court's Decisions in Ahrens v. Clark, 335 U. S. 188 and United States v. Hayman, 342 U. S. 205.

Ahrens v. Clark, 335 U. S. 188, holds squarely that a District Court under 28 U. S. C., 2241 has no jurisdiction to issue an extraterritorial writ of *habeas corpus*. The court below holds that *Ahrens* is not in point because the writ in that case was *ad subjiciendum* while

the writ involved here is *ad prosequendum* and that there is a difference in the function of the two.

But, we respectfully suggest, there is nothing in either *Ahrens* or section 2241 which even remotely permits of a holding that there is any *territorial* difference between the two.[11] The phrase "within their respective jurisdictions" appearing in Subdivision (a) of 2241 applies to the *whole* statute, (c)(5),[12] as well as (c)(3).[13] The holding of the court below to the contrary flies full force in the face of this Court's decision in *Ahrens* as well as of 2241 itself. Moreover, "the statutory scheme" before the court and considered by it, in *Ahrens* (335 U. S. at 190), is precisely that which is before the Court here and overlooked by the court below. All the 1948 revision, which resulted in 28 U. S. C., 2241, did was to combine the previous 28 U. S. C. (1940 Ed.), 451, 452 and 453 and put in one statute what had formerly been in three. Thus, the "within their respective jurisdictions" limitation which was present in Section 452, must also be considered to have applied to Section 453, which is essentially that portion of today's Section 2241 which is found in subsection (c) thereof. The meaning attributed by the court below [R. III, 6, n. 1] to the elimination by Section 2241 of the words "for the purpose of inquiring into the cause of restraint of liberty" formerly in Section 452 does not follow. Subsection 5

---

[11] *Cf. In re Van Collins* (D. Me. 1958), 160 Fed. Supp. 165, 166, note 1: "The writ of habeas corpus ad prosequendum is merely one variant of the common law writ of habeas corpus, the phrase 'ad prosequendum' being simply the designation of the purpose for which the writ is sought." (Citing cases by this Court.)

[12] To bring into court to testify or for trial.

[13] In custody in violation of the Constitution or laws or treaties of the United States.

of subsection (c) of Section 2241 reads that "the writ of habeas corpus (without the words above quoted) shall not extend to a prisoner unless (I)t is necessary to bring him into court to testify or for trial." Therefore it is not correct to say, as does the court below, that the words "habeas corpus," as used in Section 2241 (and as used in former Section 453) means only a proceeding inquiring into the cause of restraint of liberty. To so read the words is to read subdivision (5) of subsection (c) right out of the statute.

The quotation by the court below [R. III, 7] from *Ponzi v. Fessenden*, 258 U. S. 254, 264, is inapposite. Petitioner does not claim that he is immune from a second prosecution. His point is the very basic one that a federal (or, indeed, any) court must obey the law in issuing its orders and that an order issued by a court which is, as we say, beyond and in excess of its jurisdiction cannot be permitted to stand.

The court below next holds that there is extraterritorial, jurisdiction to issue the writ under 28 U. S. C., 1651 (the "all writs" statute). This, the court says is so by virtue of this Court's decision in *United States v. Hayman*, 342 U. S. 205. The court's reasoning is that the trial court has jurisdiction over the offense and over petitioner and therefore the writ is in aid of that jurisdiction. But this reasoning proves too much and the *Hayman* case holds no such thing. If accepted, it would mean that the territorial jurisdiction of the District Courts would be completely obliterated and those courts would, in effect, be but one nationwide court just because the court has jurisdiction of the case. Before so revolutionary a concept can be attributed to Congress or accepted, certainly Congress would have said so.

Rather than being "illustrative" of the fact that the District Courts have extraterritorial jurisdiction to issue writs of *habeas corpus ad prosequendum*, the two rules of criminal procedure cited by the court below [4(c)(2) —warrants; and 17(e)(1)—subpoenas,] are precisely illustrative of the contrary. They show that unless Congress (in these instances, through the rule making authority of this Court) wants to give the District Courts extraterritorial jurisdiction, those courts simply do not have it. The revisor's notes to Rule 4(c)(2) say:

> "This rule and Rule 9(c)(1) modify the existing practice under which a warrant may be served only within the district in which it is issued. Mitchell v. Dexter, C. C. A. 1, 1917, 244 F. 926; Palmer v. Thompson, 1902, 20 App. D. C. 273; . . ."

The rules enlarged the territorial jurisdiction of the district courts as to warrants and subpoenas only. There are "specific exceptions" as to them. The rule changes did not, however, nor do they purport to, enlarge the jurisdiction of the court with respect to writs of *habeas corpus ad prosequendum*.

No extraterritorial jurisdiction is breathed into 28 U. S. C. 1651(a) by virtue of the fact, relied upon by the court below [R. III, 7], that the district court has jurisdiction over the offenses and over the defendant. The same jurisdiction was present in *Palmer v. Thompson* (1902), 20 App. D. C. 273, where the defendant had already been tried and found guilty in the Eastern District of Tennessee and was wanted back from the District of Columbia for sentencing. At that time (1902) the "all writs

statute" was then too in the law [R. Supp. 716][14] and read essentially the same way as it does today.[15]

So also did the Eastern District of Wisconsin have "jurisdiction" over the cause and the defendant in *Mitchell v. Dexter*, 244 Fed. 926 (C. C. A. 1, 1917). But this, nor the then "all writs statute" (see f.n. 14 and 15, *supra*), did not enlarge the territorial jurisdiction of the Wisconsin court to issue its writ of arrest for effectuation in Massachusetts. The court said (244 Fed. at 930):

> "The Court of Appeals for the District of Columbia, in Palmer v. Thompson, 20 App. D. C. 273, expressly held that, in the absence of an act of Congress conferring the power, the federal court in one district had no authority in a criminal case to issue its writ to the marshal of another federal district, commanding him to arrest a person within his jurisdiction, but outside that of the court issuing the writ, and that such power was not conferred by section 716 of the Revised Statutes. . . .
>
> "Furthermore, we do not think section 262 of the Code (R. S. §716; Judiciary Act Sept. 24, 1789, c. 20, §14, 1 Stat. 73) gives authority to a federal District Court to issue processes to run beyond the limits of the territory in which it is established, but rather that it is a designation of the form or char-

---

[14]And had been since 1789 (1 Stat. 81; Act of Sept. 24, 1789, Ch. 20, Sec. 14.

[15]"The Supreme Court and the circuit and district courts . . . shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law." The addition of the words in 1651(a) "or appropriate" and the change of the words "in aid" from "for the exercise" did not, we submit, effect any change of meaning.

acter of writs which such court may issue within the territory where it is established. Hills & Co. v. Hoover, 220 U. S. 329, 336, 337, 31 Sup. Ct. 402, 55 L. Ed. 485, Ann. Cas. 1912C, 562; McClellan v. Carland, 217 U. S. 269, 279, 30 Sup. Ct. 501, 54 L. Ed. 762."

Accordingly the fact that the district court has jurisdiction over the cause and the defendant, does not enlarge its territorial jurisdiction. Where extraterritoriality is desired, Congress and this Court (through its rule making power) says so.

And, of course, the fact that as to some matters (subpoenas and warrants) the district courts have been given extraterritorial jurisdiction does not mean that in other respects (here, writs of *habeas corpus ad prosecuendum*) the jurisdiction is likewise enlarged. To so hold would set at naught the need for "specific exceptions" to the territorial rule (*Ahrens v. Clark*, 335 U. S. at 190).

The court below misreads, we respectfully suggest, this Court's opinion in *Hayman*. In *Hayman* this Court was careful to make very clear that it was not modifying or making inroads on *Ahrens*, or enlarging the territorial sweep of the writ of habeas corpus. Thus the Court said (342 U. S. at 220):

". . . *This is not a habeas corpus proceeding.* The sentencing court in the Southern District of California would not be issuing an original writ of habeas corpus to secure respondent's presence in another district. Issuance of an order to produce the prisoner is auxiliary to the *jurisdiction* of the trial court over respondent *granted in Section* 2255 itself and invoked by respondent's filing of a motion under that Section." (Italics added).

As we understand Hayman, it is this:

Prior to the enactment of 28 U. S. C., 2255, when a prisoner desired to test the validity of the sentence which had been imposed upon him, he filed habeas corpus proceedings in the district in which he was confined. Because of the territorial limitation of habeas corpus, the prisoner could not file such proceedings in the district in which he had been sentenced. The result was that there arose the practical difficulty of holding the hearing in the district of the prisoner's confinement, thus requiring the bringing of witnesses, records, etc. from the district in which defendant had been sentenced. To meet these difficulties section 2255 was enacted, and by its provisions:

1. The defendant was given the right to file his motion in the district court in which he had been sentenced
2. The district court in that district was given the jurisdiction to hold the hearing in that district; and
3. That district court was given the authority—by the statute itself—to produce the prisoner at the hearing, even though he be confined in another district.

In other words, Congress had made a specific exception to the rule that the power of the district courts to issue writs is limited to the territorial jurisdiction of said courts. This exception was found by this Court in Section 2255 itself.

But the statutes (18 U. S. C., 1951, 875(b) and 371) under which the trial court in the case at bar has jurisdiction over the offenses and the defendant do not, either

expressly or by implication, extend the territorial jurisdiction of the trial court. Hence 28 U. S. C. 1651(a) cannot enlarge that jurisdiction. And the statute (28 U. S. C., 2241) which gives the Court jurisdiction to issue the writ altogether is, as *Ahrens* makes clear, limited territorially.

The concern of the Court below that a decision upholding petitioner's contention would mean that the District Courts would be impotent to bring a prisoner to trial from another district, is unnecessary. Petitioner only claims that the court cannot exceed its jurisdiction and that if Congress wants to make habeas corpus jurisdiction extraterritorial, it knows how to, and can, do so. As has been said: "The objection to judicial restraint of an unauthorized exercise of power is not weighty." (*Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123, 157, concurring opinion).

It seems clear, therefore that the decision of the court below is in direct conflict with this Court's decision in *Ahrens* and that the court below misunderstood the meaning of this Court's ruling in *Hayman*. Accordingly this is a proper case for the granting of certiorari under this Court's Rule 19(1)(b) (4th phrase).

Conclusion.

The petition for writ of certiorari should be granted.

Respectfully submitted,

A. L. WIRIN,

FRED OKRAND,

Attorneys for Petitioner.

WILLIAM B. BEIRNE,

Of Counsel.

APPENDIX "A."

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

Paul John Carbo, Appellant, vs. United States of America, Appellee. No. 16,820.

Filed March 23, 1960.

On Appeal from the United States District Court for the Southern District of California, Central Division.

Before: Stephens, Pope and Hamlin, Circuit Judges.

Per Curiam:

A 10-count indictment was returned by the Grand Jury in the Southern District of California, Central Division, on September 22, 1959, charging Paul John Carbo, aka Frankie Carbo, hereinafter appellant, and four others with violations of 18 U.S.C.A. §§1951, 875(b) and 371. Appellant posted bond at Baltimore, Maryland, returnable to the United States District Court at Los Angeles in the sum of $100,000.00. Thereafter, but prior to his appearance in Los Angeles upon the charges contained in the indictment filed there, appellant was charged with and pleaded guilty to three misdemeanor counts in New York City, New York, and was sentenced to two years in prison and fined. During appellant's New York confinement in prison, the New York authorities honored a writ of habeas corpus ad prosequendum issued by the District Court for the Southern District of California and permitted appellant to appear in said court at Los Angeles to answer to the charges in the indictment. On December 2, 1959, when he appeared in said Court, he was arraigned on the charges contained in the indictment, and stated that he had posted a $100,000.00 bond. On December 8, in

said District Court, the defendant requested permission to enter his plea and be permitted to return to New York and later return to Los Angeles for trial. Appellant entered a plea of not guilty to counts 1, 3, 5, 7 and 9 of the indictment, and the Court then set the case against all defendants for trial on March 29, 1960, and at appellant's request directed that he be returned to New York for the purpose of obtaining counsel and be returned to the Southern District of California in time for trial.

On March 16, 1960, after application by the United States Attorney, the District Judge in said district directed the issuance of a document entitled "Habeas Corpus Ad Prosequendum" directed to the jailer of New York City Prison, Bellevue Hospital, New York City, New York, commanding him to produce the appellant in the District Court for his trial upon March 29, 1960. Appellant filed in said District Court a motion to quash said writ and the United States Attorney filed an opposition to such motion. After hearing, the District Court denied appellant's motion to quash.

Appellant thereupon appealed to this Court from said order of denial.

On March 22, 1960, after a motion to dismiss said appeal had been filed by the United States Attorney, counsel for the appellant and the United States filed memoranda of authorities and orally argued the matter before this Court. It was stipulated by counsel for appellant and for the United States that the appeal itself might be deemed submitted to this Court for decision upon the merits, upon the record as filed and the briefs and memoranda of the parties on file with the Court, and without further briefs or argument, and this Court so ordered.

Appellant contends that the District Court had no jurisdiction to issue the writ in question, because the appellant is in custody in New York out of the territorial jurisdiction of the District Court.

Appellant relies upon *Ahrens v. Clark*, 335 U. S. 188, decided June 21, 1948. In that case, the petitioners were confined in New York and the petitions for habeas corpus alleging the illegal restraint of their liberty in New York were filed in the District Court of the District of Columbia.

The statute there under consideration by the Court then provided (28 U.S.C. 452):

"The several justices of the Supreme Court and the several judges of the circuit courts of appeal and of the district courts, within their respective jurisdictions, shall have power to grant writs of habeas corpus *for the purpose of an inquiry into the cause of restraint of liberty.* A circuit judge shall have the same power to grant writs of habeas corpus within his circuit, that a district judge has within his district; and the order of the circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had." [Emphasis ours.][1]

The Court stated at page 190:

"The question at the threshold of the case is whether the words 'within their respective jurisdictions' limit the district courts to inquiries into the *causes of restraints*

---

[1]The successor to this section is 28 U.S.C. 2241. The reviser's notes to this section state:

"Words 'for the purpose of an inquiry into the cause of restraint of liberty' in section 452 of Title 28, U.S.C., 1940 ed., were omitted as merely descriptive of the writ."

of liberty of those confined or restrained within the territorial jurisdictions of those courts." [Emphasis ours.]

In the instant case there is no question before the Court of any illegal restraint of liberty. The appellant does not complain that he is illegally restrained by any authority. His only objection is his contention that the United States District Court cannot by its order arrange to have him brought from New York to Los Angeles for trial upon charges contained in an indictment on file in the District Court there. The *Ahrens* case is not in point.

There is a distinction between the writ of habeas corpus ad subjiciendum which was under consideration in the *Ahrens* case and the writ of habeas corpus ad prosequendum which is under consideration in this case. Price v. Johnston, 334 U. S. 266, at 281.[2]

The purpose of the writ of habeas corpus ad subjiciendum (sometimes called The Great Writ) is to inquire as to the legality of the prisoner's restraint. It was this writ that the Supreme Court was discussing in *Ahrens*.

The writ of habeas corpus ad prosequendum has an entirely different purpose. The legality of the prisoner's restraint is not in question. It is issued "when it is necessary to remove a prisoner . . . in order to . . . be tried in the proper jurisdiction wherein the fact was

---

[2]Black's Law Dictionary, 4th Ed. 1957, contains the following at page 837:

HABEAS CORPUS. Lat. (You have the body.) The name given to a variety of writs, (of which these were anciently the emphatic words,) having for their object to bring a party before a court or judge. In common usage, and whenever these words are used alone, they are understood to mean the *habeas corpus ad subjiciendum*, (see infra). Dancy v. Owens, 126 Okl. 37, 258 P. 879, 884; In re McDavitt, 101 Misc. 588, 168 N.Y.S. 433; U.S. v. Tod, 263 U.S. 149, 44 S.Ct. 54, 57, 68 L.Ed. 221; Payne v. Graham, 20 Ala. App. 439, 102 So. 729, 731.

committed." Price v. Johnston, *supra*. That this should be done is indicated by the language of the Supreme Court in Ponzi v. Fessenden, 258 U. S. at 264, where it is said:

"The authorities, except when special statutes make an exception are all agreed that the fact that a defendant in an indictment is in prison serving a sentence for another crime gives him no immunity from the second prosecution. . . . Delay in the trial of accused persons greatly aids the guilty to escape because witnesses disappear, their memory becomes less accurate and time lessens the vigor of officials charged with the duty of prosecution. If a plea of guilty and imprisonment for one offense is to postpone trial on many others it furnishes the criminal an opportunity to avoid the full expiration of his crimes."

Respondent contends that the District Court had power to issue the writ in question under 28 U.S.C.A. §1651(a), which reads as follows:

The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

The District Court had jurisdiction of the offense charged against the defendant-appellant and of the appellant himself. After his arrest he had given a bond conditioned upon his appearance in the District Court at appropriate times; he had appeared in the District Court in answer to the charge against him; had entered a plea of not guilty; and had consented to a trial date being set. At his request, he was permitted to return to New York pending his trial.

Under §1651 the District Court had the power to issue all writs necessary or appropriate in aid of its jurisdic-

tion. As illustrative of the fact that the power of the District Court may extend beyond its territorial limits, attention may be called to two rules of the Federal Rules of Criminal Procedure, which have the force of law.

Under Rule 4 of the F.R.C.P., providing for warrants of arrest, subdivision (c)(2) provides: "The warrant may be executed . . . at any place within the jurisdiction of the United States."

Under Rule 17 F.R.C.P., providing for the attendance of witnesses, subdivision (e)(1) provides: "A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within the United States." These rules make it plain that the jurisdiction of a District Court for certain purposes is not limited to the territorial jurisdiction of that Court.

In United States v. Hayman, 342 U. S. 205, the Supreme Court had occasion to consider the power of a District Court in a section 2255 proceeding. In holding there that the District Court had the power to order the presence of a prisoner who was confined in another district, the Supreme Court said:

"The very purpose of Section 2255 is to hold any required hearing in the sentencing court because of the inconvenience of transporting court officials and other necessary witnesses to the district of confinement. The District Court is not impotent to accomplish this purpose, at least so long as it may invoke the statutory authority of federal courts to issue 'all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.' An order to secure respondent's presence in the sentencing court to testify or otherwise prosecute his motion is 'necessary or

appropriate' to the exercise of its jurisdiction under Section 2255 and finds ample precedent in the common law."

We believe that in this case the District Court is not impotent to bring before it for trial a defendant who has been indicted by that Court, who has entered a plea of not guilty in that Court, and who at his request has gone to the State of New York, and whose presence is now required in the Southern District of California for the purpose of proceeding with the prosecution against him.

We hold that the writ issued in this case by the District Court was proper under 28 U.S.C.A. §1651(a) as being necessary and appropriate in aid of its jurisdiction.

Judgment affirmed.

Appellant has also presented a motion for leave to file a petition for a writ of mandamus directed to the District Court to quash the issued writ and a motion to stay enforcement of the issued writ. Each of said motions is denied.

(Endorsed) Per Curiam Opinion Filed Mar. 23, 1960.

FRANK H. SCHMID, *Clerk.*

APPENDIX "B."

United States Court of Appeals, for the Ninth Circuit.

Paul John Carbo, Appellant, vs. United States of America, Appellee. No. 16,820.

Appeal from the United States District Court for the Southern District of California, Central Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division, and on motion of Appellee to dismiss appeal, and motion of Appellant for stay of proceedings, and petition of Appellant for leave to file petition for writ of mandamus, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is affirmed, that the motion for stay of proceedings, be, and hereby is denied, and that the motion for leave to file petition for writ of mandamus, be, and hereby is denied.

(Endorsed) Filed and entered March 23, 1960.

FRANK H. SCHMID, *Clerk.*

APPENDIX "C."

In the United States District Court, Southern District of California, Central Division.

United States of America, Plaintiff, vs. Paul John Carbo, *et al.*, Defendants. No. 27973-CD.

Order.

The above cause having come on for hearing on March 28, 1960, the United States appearing by Robert John Jensen, Chief, Criminal Division, Assistant United States Attorney and Charles A. Lynberg, Assistant United States Attorney and the defendant Paul John Carbo appearing by his attorneys William B. Beirne and A. L. Wirin, it appearing that because of the illness of the said defendant Paul John Carbo and the performance upon him of a kidney operation on March 25, 1960, that it is improvident to transport said defendant from the New York City Prison, Bellevue Hospital, New York City to Los Angeles, California for trial on or before March 29, 1960, the date presently set for the trial of the above cause, and the Court having continued said trial date of said cause until July 12, 1960, and good cause appearing therefor:

1. It is ordered and adjudged that the Order of the Court dated March 16, 1960 ordering that a Writ of Habeas Corpus ad Prosequendum issue as prayed for in the application dated March 16, 1960, of the United States Attorney, is continued in full force and effect.

2. The order and Judgment of the Court dated March 16, 1960, denying said defendant's Motion to Quash said Writ of Habeas Corpus ad Prosequendum remains in full force and effect.

3. The execution of said Order of March 16, 1960 ordering that a Writ of Habeas Corpus ad Prosequendum issue as heretofore prayed for herein is continued, and the enforcement and execution of the Writ of Habeas Corpus ad Prosequendum issued by the Clerk of this Court on March 16, 1960 pursuant to the aforesaid Order, is continued and stayed in the following respects: said writ shall be executed on or after June 24, 1960; said defendant shall be transported from the New York City Prison, Bellevue Hospital, New York City to Los Angeles, California for trial, pursuant to said Writ, between June 24 and June 27, 19 0, the defendant to be brought to Los Angeles by June 27, 1960 during said period between June 24 and June 27, 1960.

The Clerk shall issue an Amended Writ of Habeas Corpus ad Prosequendum pursuant to the foregoing Order.

DATED: This 28th day of March, 1960.

Ernest A Tolin

ERNEST A. TOLIN,

United States District Judge.

Approved as to form:

ROBERT JOHN JENSEN,

Of Counsel for the United States.

APPENDIX "D."

United States District Court, Southern District of California, Central Division.

United States of America, Plaintiff, vs. Paul John Carbo, aka Frankie Carbo, *et al.*, Defendant. No. 27973, Criminal.

Amended Writ of Habeas Corpus ad Prosequendum, Being an Amendment to the Writ of Habeas Corpus ad Prosequendum Issued.

Filed March 16, 1960.

The President of the United States of America.

To: The Warden, Sheriff or Jailor of New York City Prison, Bellevue Hospital, New York, New York.

Greeting:

We command that you produce and deliver the body of Paul John Carbo, aka Frankie Carbo now in your custody before the Honorable Ernest A. Tolin, Judge of the United States District Court, Second Floor, United States Post Office and Courthouse, 312 North Spring Street, Los Angeles, on July 12, 1960, at the hour of 10:00 a.m., in order that said defendant in the above-entitled case may then and there be tried at said time and place, and also at such other times as may be ordered by the said court, and have you then and there this writ.

The delivery of the body of said Paul John Carbo, aka Frankie Carbo to the Courtroom of said United States District Court, as aforesaid, and the return by you of said defendant to your custody shall be deemed sufficient compliance with the writ.

The enforcement and execution of the foregoing writ of Habeas Corpus ad Prosequendum is continued and

stayed in the following respects: this Writ shall be executed on or after June 24, 1960; said defendant shall be transported from the New York City Prison, Bellevue Hospital, New York City to Los Angeles, California for trial, pursuant to said Writ, between June 24 and June 27, 1960, the defendant to be brought to Los Angeles by June 27, 1960 during said period between June 24 and June 27, 1960.

Witness the Honorable Ernest A. Tolin, Judge of the United States District Court for the Southern District of California.

Dated: March 30, 1960.

Clerk, United States District Court,
Southern District of California,

By EDW. F. DREW,
Deputy Clerk.